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Supreme Court of the United States.

OCTOBER TERM, 1938.

No. 828.

METROPOLITAN COOPERATIVE MILK PRODUCERS BARGAINING AGENCY, INC.,
Appellant,

vs.

ROCK ROYAL COOPERATIVE, INC., *et al.*,
Appellees.

BRIEF FOR APPELLANT.

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Appellees.

On Appeal from the District Court of the United States for the Northern District of New York.

BRIEF FOR APPELLANT.

Opinion Below.

The District Court rendered an opinion after the trial of the action (R. 743). That opinion is as yet not reported.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 2 of the Act of August 24, 1937, 50 Stat. 752 (28 U. S. C. Sec. 349 a).

The decree of the District Court was entered March 21, 1939, and the petition for appeal was allowed March 21, 1939. The case was docketed in this Court on March 30, 1939 and the Court entered an order noting probable jurisdiction on April 3, 1939.

Statement of the Case.

The statute involved is the Agriculture Marketing Agreement Act of 1937 (Public No. 137, 75th Congress, 50 Stat. 246), which reenacted and amended certain provisions of the Agricultural Adjustment Act of 1933 (48 Stat. 31), which had been added to the original Agricultural Adjustment Act by an amendment enacted August 24, 1935. (49 Stat. 750.) The regulation involved is order No. 27 issued thereunder by the Secretary of Agriculture, regulating the handling of milk in the New York Milk Marketing Area which is in the current of interstate commerce, or directly burdens, obstructs, or affects interstate commerce.

The defendants having failed to pay their indebtedness to the Market Administrator, the United States of America on October 27, 1938, as plaintiff, commenced an action against the defendants Rock Royal Co-Operative, Inc., Schuyler Junction New York Milk Shed Cooperative, Inc., and Central New York Cooperative Association, Inc. (R. 1), and another action against Jetter Dairy Company, Inc. on November 23, 1938 (R. 40). By an order of the Court below, these actions were consolidated. (R. 61.) These complaints in effect were for mandatory injunctions to compel the defendants to comply with Order No. 27 issued by the Secretary of Agriculture.

Thereafter, Metropolitan Cooperative Milk Producers Bargaining Agency, Inc., the appellant herein, moved for an order under Rule 24-B of the Rules of Federal Procedure permitting it to intervene as party plaintiff on the ground that its claim arose out of the same controversy as that of the original plaintiff and was ancillary to the claims as set forth in the complaints of the plaintiff, the United States of America. The said motion permitting Metropolitan Cooperative Milk Producers Bargaining Agency, Inc. to intervene as a party plaintiff was granted by consent of all the parties. The complaints of the said intervening plaintiff against the defendant ask for the same relief as the original plaintiff, the United States of America.

These actions as consolidated came to trial and on February 23, 1939, the Court below rendered its written opinion (R. 743), holding that:

(1) Order No. 27 unlawfully discriminates in favor of large cooperatives and deprives proprietary handlers and small cooperatives, such as the appellees, of their property without due process of law, in violation of the Fifth Amendment.

(2) This discrimination is necessarily present in Order No. 27 by reason of the provisions of the Act, particularly the provisions of Section 8c (5) of the Act, specifying the terms which an order pertaining to milk shall contain; and, therefore, the Act is unconstitutional.

(3) The Secretary's determination, approved by the President pursuant to Section 8c (9) of the Act, that Order No. 27 was approved or favored by more than two-thirds of the producers, producing milk for sale in the marketing area, was in-

effective to put Order No. 27 in operation, because the referendum among producers, conducted by the Secretary pursuant to Section 8c (19) of the Act, was influenced by false and misleading propaganda in favor of the Order carried on by the Bargaining Agency and the League and by misleading statements contained in a pamphlet issued by the Department of Agriculture.

The District Court entered its findings of fact and conclusions of law on March 21, 1939 (R. 127) and on the same day entered its final decree dismissing the action (R. 743). The appellant appeals from the final order and decree dismissing its bills of complaint.

Assignment of Errors.

The appellant herein specifies the same errors as the appellant, the United States of America, in its appeal No. 771, intended to be argued simultaneously herewith, and this appellant hereby adopts as his brief, the brief filed by the appellant, the United States of America, in case No. 771 aforementioned. Supplementary thereto, this appellant files this memorandum bearing upon two points:

1. Economic necessity of equalization of prices in the Metropolitan Milk Shed to secure orderly marketing, assure each producer a fair share of the fluid milk market, and obtain market stability.
2. That all of the milk produced in the Metropolitan Milk Shed is in the current of interstate commerce or so as directly to burden, obstruct or affect interstate commerce of milk and its products.

I.

Economic Necessity for Equalization.

The New York metropolitan milk marketing area under the Federal and State orders includes the City of New York and the counties of Nassau, Suffolk, and Westchester, all in the State of New York. This area is the largest market for fluid milk in the world. An average of more than 13,000,000 pounds of milk a day is delivered by dairy farmers to plants approved by health authorities to ship milk into the New York market. About half of this amount is shipped into the marketing area in fluid form, the other half being used for cream and other dairy products for the market.

More than 10,000,000 people live in the area covered by the Federal-State milk marketing program. Most of the plants which ship milk to supply this population are located from 150 to 350 miles from the marketing area. Some plants are located over 500 miles away.

Numerous difficulties arise because of the great size of the market and the vast territory covered by the producing area from which the necessary milk supply must be drawn. During the fall and winter months, when milk production is naturally short, it is necessary for the market to reach out to the farthest points of the producing area in order that the total supply of milk may be adequate for the needs of the market. In this distant producing area, located for the most part in northern New York, the climate is severe and there is a great variation in the amount of milk produced during different seasons of the year, late fall and win-

ter production often being about half of that in the spring and summer.

Because of the metropolitan market's demand for their fluid milk during the short period of the year, farmers located at great distances from the market must maintain throughout the year a sufficient number of cows in their herds to produce the amount of milk required. During the spring and summer months these farmers have nearly twice as much milk available as they have during the fall and winter months, but the metropolitan market does not require their milk because the supply nearer the market is also plentiful at that time. Throughout the year the distant producers must maintain their herds and farms and keep up to standards required by New York health regulations, just as if their milk went to the metropolitan market every day.

This situation, arising as it does out of the metropolitan market's demand for fluid milk during the time of the year when production is naturally down, has forced the distant producer to engage in a constant struggle for a place in the market during the spring and summer months when milk supplies are plentiful. Through this struggle the distant producer has tried to obtain a sustaining share of the market for fluid milk on a year round basis. On a few occasions the struggle has gone to the extent of milk strikes, accompanied by disorder and the dumping of milk, as in 1933 and 1937. These strikes were costly to dairy farmers, and menaced the milk supply of consumers.

The early efforts of dairy farmers to improve milk marketing conditions and to obtain more equitable

treatment in their market are characterized by the organization of cooperatives. This group action to achieve market stability has helped producers to a considerable extent and is now regarded as an integral part of the dairy industry.

Effective as cooperatives were, it soon became evident that measures were needed to supplement the efforts which producers were exerting through their organizations. By 1933 the periodic struggles of producers to hold a share in the New York market were an old story. Other milk markets had experienced similar difficulties.

Producers throughout the country sought the aid of their State and Federal Governments in improving milk marketing conditions. Federal help in providing for milk market regulatory programs first came into existence in 1933 under the Agricultural Adjustment Act, the marketing provisions of which were reenacted and amended by the Agricultural Marketing Agreement Act of 1937. Also in 1933, the New York State Milk Control Act was passed, the first such piece of legislation in the United States. Today, about half the States have State milk regulatory laws in effect.

The New York State Milk Control Act, which was upheld by the United States Supreme Court in 1934, appeared to benefit producers to a large degree in its early years. Handlers of milk in New York, however, soon found that they could evade the effects of the State law by getting their milk supplies from outside of the State. This shift to outside sources of milk reduced the effectiveness of the State law. In the spring of 1937, this milk control measure was not reenacted.

In its place, the Rogers-Allen Act was passed as a New York State law in May 1937. This measure authorizes cooperative associations of producers to bargain collectively with milk distributors. It aims at stabilizing marketing conditions in milk markets of New York State through collective bargaining procedure between organized producers and organized distributors. The act also authorizes the State Commissioner of Agriculture and Markets to issue orders under certain conditions if the bargaining system fails to produce satisfactory results. The orders may fix prices paid by handlers to milk producers in the State.

As soon as the Rogers-Allen Act was passed, groups of producers organized the Metropolitan Cooperative Milk Producers' Bargaining Agency. Nearly 100 different cooperatives having a membership of over 40,000 milk producers became members of the bargaining agency. At the same time handlers organized the New York Metropolitan Milk Distributors' Bargaining Agency to negotiate with the producers' organization.

For a while conditions in the metropolitan New York milk market took on a more orderly aspect. This improvement, however, did not last very long. A considerable number of dairy farmers remained outside of the producers' bargaining agency. Many handlers broke away from the distributors' bargaining agency and were free to buy milk from producers at their own prices, which were less than those negotiated between the two organizations. As a result market conditions once more became chaotic.

In an effort to meet these conditions, milk producers started a move to invoke the regulatory features of the Rogers-Allen Act, and at the same time requested the help of the Federal Government in regulating the handling of milk that comes into New York from outside the State. They sought a program to establish uniform rules under which handlers would buy their milk from producers both in and out of the State. Such a program, they felt, would overcome the weaknesses of earlier efforts which were confined to milk produced within the State.

Efforts to develop such a program continued for nearly a year. Through conferences with representatives of producers, consumers, distributors, and representatives of the Agricultural Adjustment Administration and the New York State Department of Agriculture and Markets, a proposed Federal-State program was developed. This proposal was considered at a series of public hearings held in various sections of New York State from May 16 to June 8, 1938. The hearings were conducted jointly by the Secretary of Agriculture and the New York State Commissioner of Agriculture and Markets, and gave producers, consumers, and distributors an opportunity in which to express their views on the proposal.

The Federal-State program mentioned above, expressed in Federal Order No. 27 and New York State Order No. 126, approved by the producers affected by referendum and promulgated by the Secretary of Agriculture of the United States and the Commissioner of Agriculture and Markets of the State of New York, sought particularly to establish market stability

by keeping "distressed" milk off the fluid market by supplying only normal fluid market demands and providing for the manufacture of such milk as might be in excess of such demands. In this manner the stability of the fluid and cream market was maintained, its price protected and a higher blend price assured to producers. The universal scramble among producers for a share of the fluid market which contributes so largely to market breakdown in times of milk surplus was eliminated by removing the incentive for an exclusive fluid market, and by the knowledge on the part of the producer that under equalization his return would be equal to the return of every other producer in the milk shed regardless of the utilization of his milk.

Competition for fluid markets by producer groups periodically causes market breakdown. Eliminate that competition by equalization of prices by which you give every producer his share of the fluid market but compel him to share his portion of the burden of surplus, and a stable market can be maintained. The Orders destroyed the practice of dumping "distressed" milk from fluid plants which had lost their regular markets or which over-produced and had no manufacturing facilities, by equalization of prices, accomplished partly through charges against all milk, paid out of the producers' settlement fund before the uniform price was fixed, to pay the extra expense of moving this surplus milk to other country-plants for manufacture.

Unless equalization is adopted as a basic principle of a milk marketing program, that program must fail, and in the strife for obtaining the best market available, each producer and each producer group will con-

tinue to send its milk to the fluid market until competition has reduced the fluid price to the manufacturing level. Only by removing the incentive for placing fluid milk from one country plant in competition with fluid milk from another country plant in the city market can orderly marketing with price stability be attained, and equalization of prices is the only method of achieving that result. It assures all handlers the same cost for milk sold in the marketing area and assures payments to all producers at a uniform rate for that milk.

"The fluid milk industry is affected by factors of instability peculiar to itself which call for special methods of control. A satisfactory stabilization of prices for fluid milk requires that the burden of surplus milk be shared equally by all producers and by all distributors in the milk shed. So long as the surplus burden is unequally distributed, the pressure to market surplus milk in fluid form will be a serious disturbing factor." (Pitcher Report, 1932.)

II.

That all of the milk produced in the metropolitan milk shed is in the current of interstate commerce or so as directly to burden, obstruct or affect interstate commerce of milk and its products.

The vast amount of milk necessary to meet the daily needs of 10,000,000 people in the marketing area is produced by approximately 65,000 farmers situated in the states of New York, Pennsylvania, New Jersey, Vermont, Maryland, Connecticut and Massachusetts, all of which milk produced for sale in the marketing

area is handled in the current of interstate commerce or so as directly to burden, obstruct or affect interstate commerce of milk and its products.

> "That approximately one-third of the milk produced for sale in the marketing area is produced in States other than the State of New York; that approximately one-third of the milk produced in the State of New York for sale in the marketing area passes through other States on its way to be sold in the marketing area; and that milk produced in the State of New York for sale in the marketing area which does not pass through other States on its way to be sold in the marketing area is physically and inextricably intermingled with that milk which is produced outside the State of New York for sale in the marketing area or which is produced in the State of New York for sale in the marketing area but which passes through other States on its way to be sold in the marketing area." (Findings of Secretary of Agriculture, R. 12.)

The need for Federal regulation of milk in the metropolitan area has been felt for a considerable time due to the interstate character of the industry. The principal reason for the failure of the New York State Milk Control Law which went into effect April 1st, 1933, and was abandoned in 1937, was the inability of the State of New York to control the prices of milk coming into the Metropolitan Area from other States, resulting in an ever-increasing tendency upon the part of distributors in the Metropolitan Area to abandon their sources of supply in New York State and seek them in surrounding States. A general resort to this

practice resulted in market breakdown, the milk from outside of New York State being sold at lower prices than New York State milk could be sold for under the Milk Control Law. Unless all dealers are compelled to pay the same prices for milk in all of the States tributary to the Metropolitan Marketing Area, there cannot be that uniformity of price essential to the maintenance of stabilized marketing. The solution of the problem lies not in individual action by the States, but in a Federal Order regulating interstate commerce in milk with a complementary State Order with practically identical terms and provisions.

Conclusions.

It is respectfully submitted that the lower court erred in dismissing the bills of complaint on appeal herein and the decree of the court below should be reversed.

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